IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE HOME INSURANCE COMPANY,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
KENNETH J. POWELL, JR., ESQUIRE, et al.,	:	
Defendants.	:	**NO. 95-6305**

M E M O R A N D U M

Reed, J. **June 13, 1997**

Plaintiff The Home Insurance Company ("Home Insurance") has brought this declaratory judgment action against defendants Kenneth J. Powell, Jr., Esquire, James P. Lyons, Esquire, Jeffrey P. Minehart, Esquire, Powell & Minehart, Powell, Hanes & Minehart, and Powell, Hanes & Minehart as successors in interest to Powell, O'Shea, Hanes & Minehart (collectively "Powell Minehart"). Plaintiff has also named as defendants Patricia Boylan-Jones and her husband Richard Jones (collectively the "Joneses"). Pursuant to 28 U.S.C. § 2201, Home Insurance seeks to have this Court declare that it has no duty to defend or to indemnify Powell Minehart in connection with a legal malpractice claim brought against them by the Joneses. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 as the parties are of diverse citizenship and the amount in controversy is in excess of $50,000.00, exclusive of interest and costs.[1]

Currently before the Court is the motion of plaintiff Home Insurance for summary judgment (Document No. 19), and responses of the parties thereto. For the following reasons, the motion will be granted.

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1. Plaintiff filed its complaint on October 4, 1995 in the United States District Court for the Eastern District of Pennsylvania. I note that this lawsuit was commenced before the jurisdictional amount in controversy requirement under 28 U.S.C. § 1331 increased to $75,000.00. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (enacted October 19, 1996, and effective January 17, 1997).

The facts underlying this litigation were succinctly set forth in this Court's earlier Memorandum and Order dated May 20, 1996 (Document No. 14) (hereinafter "Memorandum of May 20, 1996"), which denied the motion of Powell Minehart to dismiss the complaint of Home Insurance. There is no need to repeat those facts here. Since the Memorandum of May 20, 1996, Powell Minehart has filed an Answer and Counterclaims (hereinafter "Counterclaims"). In the Counterclaims, Powell Minehart has alleged an action for breach of contract (Count I), violation of Pennsylvania Consumer Protection Law (Count II),[2] and bad faith (Count III).

I. LEGAL STANDARD

The standard for a summary judgment motion in federal court is set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In addition, a dispute over a material fact must be "genuine," *i.e.*, the evidence must be such "that a reasonable jury could return a verdict in favor of the non-moving party." Id.

The moving party has the initial burden to identify evidence that it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing'--that is, pointing out to the District Court--that there is an absence of evidence to support the non-moving party's case." Id. at 325.

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2. Powell Minehart has withdrawn Count II of its Counterclaims, which alleged a violation of Pennsylvania Consumer Protection Law, 42 Pa. Cons. Stat. Ann. § 201-1, et seq. See Mem. of Def. at 23 (Document No. 21).

Generally, if the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations or suspicions, but must set forth specific facts demonstrating that there is a genuinely disputed factual issue for trial. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). "All inferences must be drawn in favor of the nonmoving party, all doubts must be resolved against the moving party, and all allegations of the nonmoving party that conflict with those of the movant must be taken as true." McKinney v. West End Voluntary Ambulance Ass'n, 821 F. Supp. 1013, 1017 (E.D. Pa. 1992) (internal citations omitted). Yet, if the evidence of the non-moving party is "merely colorable," or is "not significantly probative," summary judgment may be granted. Anderson, 477 U.S. at 249-50.

II. DISCUSSION

A. Summary Judgment - Coverage

In the Memorandum of May 20, 1996, this Court disposed of the motion of Powell Minehart to dismiss the complaint of Home Insurance. There, the relevant inquiry was whether Home Insurance alleged sufficient facts from which a reasonable factfinder could find that the professional liability insurance policies issued in July 1993 and July 1994 did not provide coverage to Powell Minehart for the claims made by their former clients, the Joneses. See Mem. of May 20, 1996 at 7-8. In reaching the conclusion that the complaint sufficiently pleaded a cause of action, I concluded that, given the well-pleaded record and operative facts, a reasonable attorney in the position of Powell Minehart would have had a basis to believe that

their (in)actions with respect to the representation of the Joneses constituted a breach of professional duty and thus the claims made provision of the policy had been breached. We now come to a stage later in the proceedings, where the evidentiary record has been augmented, albeit minimally.

In considering the motion for summary judgment currently before the Court, the relevant inquiry is whether there is a *material fact in dispute* that a reasonable attorney in the position of Powell Minehart would have had a basis to believe that they had breached a professional duty owed to the Joneses.[3] If there is no factual dispute, Home Insurance argues

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3. The policy provision at issue provides:

> Coverage
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> I. Professional Liability and Claims Made Clause:
> To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as the result of CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD
>
> (a) by reason of any act, error or omission in professional services rendered . . . .
>
> . . . .
> PROVIDED ALWAYS THAT such act, error or omission or such personal injury happens:
> . . .
>
> (bb) prior to the policy period, provided that prior to the effective date of this policy:
> . . .
>
> **2) the Insured had no basis to believe that the Insured had breached a professional duty or committed a personal injury;** . . .
>
> . . . .

Policy, at 2; Complaint ¶ 28 (emphasis added). The parties, in their motions to dismiss and for summary judgment, deal exclusively with whether the Powell Minehart had a basis to believe that it breached a professional duty, and not whether it committed a personal injury. Accordingly, I will limit my

(continued...)

that pursuant to the unambiguous provisions of the applicable insurance policy, there would be no coverage for the claims made by the Joneses during the policy period. I apply an objective "reasonable attorney" standard to this inquiry. See Mt. Airy Ins. Co. v. Thomas, et al., 954 F. Supp. 1073, 1080 (W.D. Pa. 1997) (predicting that the Pennsylvania Supreme Court would adopt an objective standard in determining whether malpractice claim is reasonably foreseeable given the facts known or possessed by the insured).[4] Although there is little substantial precedent interpreting the "had no basis to believe" language, I find that this language is clear and unambiguous, and I therefore interpret it plainly to mean that objectively an attorney had no reason to believe there was a possibility that a duty to the client has been breached. While the policy language does not refer to the potential liability of the attorney for legal malpractice, one court has concluded that similar language means the mere possibility of legal liability. See The Home Ins. Co. v. Stegenga, C.A.No. 90-275, slip op., at 5 (W.D. Pa. July 3, 1991) (unpublished) (citing Logan v. Northwestern Nat'l Cas. Co., 424 N.W.2d 179 (Wis. 1988)). A possibility is something that may or may not occur. The word does not require anything near a certainty. As well, a mere belief is not a recognition of certainty or even a likelihood of a breach of duty.

To analyze this issue, I will compare the uncontradicted factual events known to Powell Minehart prior to the issuance of the insurance policy in July 1993 and renewed in July 1994, to the professional duties of Pennsylvania attorneys.

1. What events known to Powell Minehart took place prior to the issuance of the policy in July 1993?

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3. (...continued)
analysis to the former.

4. The parties do not dispute that the objective standard is appropriate. See Counterclaims ¶ 37; Mem. of Def. at 2; Plaintiff's Response to Mot. to Dismiss at 9 (Document No. 7).

Ms. Boylan-Jones underwent two surgeries, performed by Dr. Rose, the first of which occurred on August 17, 1990, and the second on August 21, 1990. On October 13, 1990, the Joneses retained Powell Minehart to investigate the cause of Ms. Boylan-Jones' persistent discomfort and to prosecute any potential legal claims arising therefrom. At that meeting, Ms. Boylan-Jones informed Powell Minehart that she recently underwent two surgeries by Dr. Rose and that she participated in a "Nutri/System" diet regimen, and that she was uncertain whether the diet regimen or the surgeries were causing her discomfort. When Ms. Boylan-Jones' discomfort did not dissipate, Powell Minehart recommended that Ms. Boylan-Jones be examined by Dr. Paskin. Powell Minehart advised the Joneses that Dr. Paskin may discover the cause of Ms. Boylan-Jones' discomfort, which might clear or implicate Dr. Rose. On November 19, 1990, Ms. Boylan-Jones underwent a third surgery, performed by Dr. Paskin. In that surgery, Dr. Paskin found a surgical staple improperly affixed to Ms. Boylan-Jones' bile duct, which, according to Dr. Paskin and another physician, had been inadvertently overlooked and left behind by Dr. Rose and which was the cause of Ms. Boylan-Jones' discomfort.

Just less than two years after the surgeries by Dr. Rose, on August 5, 1992, Powell Minehart, on behalf of the Joneses, commenced a medical malpractice action by writ of summons against Dr. Rose and Bryn Mawr Hospital in the Court of Common Pleas of Montgomery County, Pennsylvania. In response, on August 25, 1992, Dr. Rose, following the Pennsylvania Rules of Civil Procedure, filed a Praecipe to File Complaint, and the Prothonotary promptly issued a Rule to File Complaint directed to the Joneses. When Powell Minehart did not comply with Rule to File Complaint, Dr. Rose moved for and received a judgment of *non pros* against the Joneses on October 20, 1992. Powell Minehart filed a complaint on October 22, 1992 and a motion on October 29, 1992 to open that judgment. The Court of Common Pleas dismissed the motion to open judgment on May 18, 1993 because Powell Minehart had violated Montgomery County Local Rule of Civil Procedure 302(f) by

failing to file a supporting brief to that motion. Powell Minehart sought reconsideration of the dismissal order, but reconsideration was denied by the Court of Common Pleas on June 16, 1993. Powell Minehart appealed this denial to the Superior Court of Pennsylvania on June 17, 1993.

Powell Minehart filed a second medical malpractice suit on behalf of the Joneses against Dr. Rose and Bryn Mawr Hospital in the Court of Common Pleas of Montgomery County, Pennsylvania on November 16, 1992. Because the statute of limitations for tort suits in Pennsylvania is two years,[5] Powell Minehart/Joneses rely upon the discovery rule doctrine in an attempt to render this second medical malpractice suit timely.[6] Although this suit was settled as to Bryn Mawr Hospital, it is still pending as against Dr. Rose and there is nothing in the record before this Court indicating that the legal viability of the discovery rule has been determined.

In summary, from the uncontradicted facts of record, by the time the first policy became effective in July 1993, Powell Minehart knew that its client, Ms. Boylan-Jones, was suffering discomfort caused by either a surgical procedure or a diet regimen; knew that a surgical staple was found improperly attached to Ms. Boylan-Jones' bile duct and was reasonably informed by Dr. Paskin and another physician that the staple had been inadvertently left from an earlier surgery performed by Dr. Rose;[7] knew that it commenced the lawsuit by

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5. 42 Pa. Cons. Stat. Ann. § 5524.

6. At the time of the filing of the second medical malpractice suit, an attorney in the position of Powell Minehart could reasonably presume that Dr. Rose would likely contest the statute of limitations issue.

7. Powell Minehart impliedly became aware of the surgical staple and its connection to Dr. Rose shortly after the third surgery in November 1990. It is certain that Powell Minehart knew of the staple by December 4, 1990, when it notified Dr. Rose in writing that it intended to pursue a medical malpractice claim against him on behalf of the Joneses. Aff. of Powell at ¶ 17.

securing a writ of summons on August 5, 1992; knew that it failed to file a timely complaint which resulted in a judgment of *non pros* against their clients, the Joneses; knew that it failed to follow local rules which resulted in dismissal of their motion to open judgment; knew that its motion for reconsideration of the dismissal was denied; knew that it appealed this denial, thus seeking further to resurrect the August 5, 1992 filing; knew that the second medical malpractice suit was pending; and knew that the timeliness of that lawsuit depended on the application of the discovery rule.

2. What events known to Powell Minehart took place prior to the renewal of the policy in July 1994?

On April 8, 1994, the Superior Court affirmed the order of the Court of Common Pleas of Montgomery County refusing to open the judgment against the Joneses. The Superior Court opined that the Joneses "have not complied with the local rule. When the trial court dismissed the petition to open the judgment, [the Joneses'] brief was sixty-eight days late. In light of the fact that [the Joneses] have failed to diligently prosecute the case from the start, [the Joneses'] action cannot be viewed as a non-prejudicial procedural error." Document No. 7, Exh. 9 (Judgment and Memorandum Opinion of Superior Court). On May 9, 1994, Powell Minehart filed a petition to the Supreme Court of Pennsylvania for allowance of appeal of the Superior Court decision, and on August 22, 1994, after the second insurance policy went into effect, the Supreme Court of Pennsylvania denied that request.

In summary, by the time of the renewal of the policy in July 1994, Powell Minehart knew of all the events chronicled above, plus it knew that its appeal to the Superior Court of Pennsylvania was denied in an opinion openly critical of the lack of diligence on the part of Powell Minehart and it knew that it appealed this denial to the Pennsylvania Supreme Court; all of the foregoing action by Powell Minehart was seeking further to resurrect the August 5, 1992 filing.

3. What are the professional duties of a Pennsylvania lawyer?

In Pennsylvania, an attorney owes a duty to the client to possess and exercise that degree of ordinary knowledge, skill and care that would normally be exercised by members of the profession under the same or similar circumstances. See Collas v. Garnick, 624 A.2d 117, 120 (Pa. Super.), appeal denied, 636 A.2d 631 (Pa. 1993); see also Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.), cert. denied, 474 U.S. 1010 (1985). The attorney "must be familiar with well settled principles of law and the rules of practice which are of frequent application in the ordinary business of the profession." Collas, 624 A.2d at 120.

As a general rule, a party asserting a cause of action has a duty "to institute suit within the prescribed statutory period." Pocono Int'l Raceway v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). Failure by an attorney to commence a suit within the statute of limitations period constitutes a breach of duty. See Williams v. Bashman, 457 F. Supp. 322, 329 (E.D. Pa. 1978) (holding that law firm breached duty of care to client failed to institute personal injury claim on behalf of client); Storm v. Golden, 538 A.2d 61, 65 (Pa. Super. 1988) (noting, in dicta, that attorney breaches his or her duty when allowing statute of limitations to run against former client's cause of action), appeal denied, 574 A.2d 71 (Pa. 1989); see also Ronald E. Mallen & Jeffrey M. Smith, 3 Legal Malpractice § 22.3 (1996) ("There is a common belief that an attorney who missed a statutory time requirement was negligent.").

There is a general belief that the most common legal malpractice claims involve missed time limitations. Mallen & Smith, supra, at § 22.4 (citing National Legal Malpractice Data Center of the ABA's Standing Committee on Lawyers' Professional Liability Committee). In fact, the Pennsylvania Rules of Professional Conduct,[8] require attorneys to "act with

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8. While I am cognizant that it is well established in Pennsylvania that a breach of the Rules of Professional Conduct standing alone cannot be the basis for civil liability, see In re Estate of Pedrick, 482 A.2d 215, 217 (Pa. 1984), In re Bloch, 652 A.2d 57, 63 (Pa. Super. 1993), I use the Rules here only to establish the standard of skill, knowledge, and care of attorneys in Pennsylvania. See Rizzo v. Haines, 555 A.2d 58, 67 (Pa. 1989) (continued...)

reasonable diligence and promptness in representing a client." Pa. R. Prof. Conduct 1.3 (1997). Otherwise, "[a] client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed." Id. Rule 1.3 cmt.

Returning to the case at hand, I find that it is consistent with reasonable knowledge, skill, care and diligence of an attorney that an attorney timely files pleadings and follows local rules of court procedure. Therefore, it necessarily follows that failure to timely file pleadings and to follow local rules of court procedure is a basis for a reasonable attorney to believe that there was a breach of that attorney's professional duty to the client. Specifically, I find that the fact that an attorney, when properly ordered to do so under published rules, fails to file a timely complaint in the Court of Common Pleas, which results in a judgment of *non pros* against his clients, and the fact that an attorney fails to follow published local rules by not submitting a supporting brief in the Court of Common Pleas, which results in dismissal of his motion to open judgment, would give a reasonable attorney a basis to believe that a breach of professional duty has occurred. And, when the motion for reconsideration of the judgment of *non pros* is denied, it becomes even more clear that the avenues for reopening the *non pros* judgment are limited, further causing a reasonable attorney to have a basis to believe a breach of duty to the client to properly institute the action has occurred. The fact that Powell Minehart vigorously pursued resurrection of its August 5, 1992 filing by filing a motion to open the *non pros* judgment, seeking reconsideration of that motion, appealing that motion to the Superior Court, and filing a petition seeking to appeal to the Pennsylvania Supreme Court, is evidence from which it can be reasonably inferred that not only did Powell Minehart believe the August 5, 1992 filing was important, but also that it believed it had a duty to its client, the Joneses, to

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8. (...continued)
(referring to the Code of Professional Responsibility in establishing standard of care).

resurrect that original filing to correct the breach of the duty of diligence. The failure of Powell Minehart to properly comply with the local rules when performing this duty to its clients constitutes a basis for an attorney to believe it breached that duty.

Home Insurance has shown uncontradicted evidence that Powell Minehart knew, at the time the policy was issued in July 1993 and renewed in July 1994, that its actions and inactions would and have forced the Joneses to rely entirely on the potential application of the discovery rule for satisfying the statute of limitations.[9] There is and can be no other conclusion but that Powell Minehart knew that, if the assertion of the discovery rule is ultimately adjudicated to be unsuccessful, the Joneses would have no other avenue for relief. Because it is factually unassailable that a reasonable attorney in the position of Powell Minehart would have known by July 1993 that the Joneses may be potentially precluded from relief due to their attorneys' (in)actions, I conclude that no reasonable jury could find that a reasonable attorney in the position of Powell Minehart had no basis to believe in July 1993 that it breached a professional duty to the Joneses. Based upon the evidentiary record, I conclude, as a matter of law, that by the time the first policy was issued in July 1993 Powell Minehart objectively had a basis to believe that it breached a professional duty owed to the Joneses. Accordingly, I will grant summary judgment in favor of Home Insurance on its claim for declaratory judgment and I will declare that Powell Minehart is not entitled to a defense or indemnity coverage with respect to the Joneses' lawsuit under the insurance policies issued by Home Insurance.

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9. The discovery rule for tolling the statute of limitations has an extremely limited applicability and many Pennsylvania courts have found that the rule does not excuse late filings. See, e.g., Pocono Int'l Raceway, Inc. v. Pocono Produce Inc., 468 A.2d 468, 471-72 (Pa. 1983); Seto v. Willits, 638 A.2d 258, 261-62 (Pa. Super.), appeal denied, 647 A.2d 902 (Pa. 1994); Ingenito v. AC&S, Inc., 633 A.2d 1172, 1175 (Pa. Super. 1993), appeal denied, 668 A.2d 1133 (Pa. 1995); E.J.M. and H.M. and E.M. v. Archdiocese of Philadelphia, 622 A.2d 1388, 1394 (Pa. Super. 1993).

4. What is the effect of the expert affidavits submitted by Powell Minehart?

To withstand the motion of Home Insurance for summary judgment, Powell Minehart submits affidavits of two legal experts who submit impressive qualifications. Powell Minehart argues that these affidavits create a genuine issue of material fact as to whether a reasonable attorney in the position of Powell Minehart would have a basis for to believe that they breached a professional duty owed to the Joneses. The attempt of Powell Minehart to create a disputed material fact may be genuine, but it does not meet the burden in defending against the motion for summary judgment.

In his affidavit, Jay R. Levenberg, Esq. opines that "a reasonable attorney practicing in Pennsylvania [in the same circumstances of Powell Minehart] . . . would not believe and should not have believed they caused any incident, committed any act, and/or failed to commit any act in that representation which might reasonably be expected to be the basis of a claim or suit." Harris T. Bock, Esq., in his affidavit, provides a virtually identical opinion. These opinions constitute ultimate conclusions. While both experts list or incorporate the underlying facts, they present no analysis of the material facts probative of the issue of whether there was a basis to believe a breach of duty had occurred. Furthermore, the affidavits fail to analyze what constitutes a breach of an attorney's duty to the client under Pennsylvania law and do not apply this law to the acts and omissions of Powell Minehart. Both experts use as the threshold standard whether objectively the acts or omissions of Powell Minehart would cause it to believe it "caused any incident, committed any act, and/or failed to commit any act in that representation which might reasonably be expected to be the basis of a claim or suit." It is clear that it is not the presence of information which might *lead to a claim or suit* which is the factual predicate for Home Insurance's claim for declaratory relief; rather, it is the presence of information which would cause a reasonable attorney *to believe a breach of duty to the client possibly occurred*. These are two entirely distinct standards. Because the affiants base their

opinions on the inappropriate standard, the probative value of the affidavits are further diminished.

Moreover, neither Levenberg nor Bock acknowledge in their affidavits the fact that Powell Minehart relied upon the ultimate application of the discovery rule which remains uncertain and that uncertainty would have been known to a reasonable attorney before July 1993 and July 1994. Instead, Bock merely gives his view that Powell Minehart initiated the second medical malpractice suit "before the statute of limitations expired which had been determined by the application of the discovery rule," whereas Levenberg makes no mention whatsoever of Powell Minehart's reliance on the discovery rule. The failure of Levenberg and Bock to recognize the uncertainty of the discovery rule's application in the underlying lawsuit is another serious defect in their affidavits because that failure by the affiants shows they ignored the reciprocal importance of the botched August 5, 1992 filing in the mind of a reasonable attorney from which it only could be inferred that a duty to diligently and competently pursue the August 5, 1992 filing had been breached. Overall, I find that the opinions contained in the affidavits are conclusory, insufficient, vague, not probative of the ultimate issue before the Court, and of scant evidentiary value. These affidavits therefore will not defeat a motion for summary judgment. See Anderson, 477 U.S. at 249-50; see also Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1985) ("[T]he affiant must ordinarily set forth facts, rather than opinions or conclusions. An affidavit that is essentially conclusory and lacking in specific facts is inadequate to satisfy the movant's or [nonmovant's] burden.") (internal quotations omitted).

Powell Minehart asserts two additional arguments in an attempt to defeat the motion for summary judgment. First, Powell Minehart contends that this Court, in discussing the viability of the discovery rule approach in the Memorandum of May 20, 1996, misapplied Ingenito v. AC&S, Inc., 633 A.2d 1172 (Pa. Super. 1993). Powell Minehart argues that the Joneses satisfied the requirement of the Ingenito court, *i.e.*, that a plaintiff must investigate

diligently the cause of his or her illness. According to Powell Minehart, Patricia Boylan-Jones, upon a reasonable and diligent investigation, learned the cause of her discomfort on November 19, 1990, and therefore the last day she could file a timely complaint against her physician was November 19, 1992. Second, Powell Minehart presents the deposition testimony of Ms. Boylan-Jones[10] in support of the contention that the alleged negligent surgery(ies) performed on Ms. Boylan-Jones in August 1990 was or were not discovered until November 19, 1990 and therefore Powell Minehart had no reason to believe that it breached any professional duty owed to the Joneses. Both of these arguments, however, pertain to the defense of Powell Minehart in its underlying legal malpractice case. In essence, Powell Minehart is arguing the merits of the discovery rule on the Joneses medical malpractice lawsuit, the ultimate application of which is not to be determined by this Court. This Court's determination is limited to whether Powell Minehart's failure to timely file a complaint and follow local court procedure, and thus cause a judgment of *non pros* to be entered against its clients, which in turn caused the Joneses to rely solely on the ultimate viability of the discovery rule, is an objectively conclusive basis to find that Powell Minehart had a basis to believe it had breached a professional duty to the Joneses

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10. Home Insurance argues that the deposition testimony of Boylan-James should not be considered because Home Insurance was not present or represented at the taking of the deposition and was not given notice thereof. Depositions used in motions for summary judgment can be used whenever an affidavit would be permissible, even when the conditions of the rule on use of a deposition at trial are not satisfied. See Wright, Miller, & Marcus, Federal Practice and Procedure: Civil 2d § 2142 (1994) (citing Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 768 (8th Cir. 1992)). I note that the portions of the deposition of Patricia Boylan-Jones presented to the Court do not indicate whether the statements contained therein were sworn, and thus its status as a reliable substitute for an affidavit is questionable. Despite this shortfall, I will review the deposition testimony of Boylan-Jones offered by Powell Minehart to resolve the motion for summary judgment. This conclusion is consistent with the Court's obligation to view a motion for summary judgment in the light most favorable to the nonmoving party. See McKinney, 821 F. Supp. at 1017.

by July 1993. These arguments of Powell Minehart are merely an attempt to reframe the issue before the Court. The ultimate viability of the discovery rule does not present a genuine dispute of material fact as to whether, at the time Powell Minehart was issued the insurance policy, a reasonable attorney in the position of Powell Minehart had a basis to believe it breached a professional duty owed to the Joneses when it failed to file a timely complaint and follow local rules of court procedure and thus cause the judgment of *non pros* to be entered against the Joneses.

Finally, defendant Joneses articulate an entirely different basis for coverage than does Powell Minehart. The Joneses argue in their memorandum response that Powell Minehart committed a new act of legal malpractice when it marked the second medical malpractice suit against Bryn Mawr Hospital "settled, discontinued and ended" in December 1992. This alleged legal malpractice, according to the Joneses, could not have been realized until April 1996,[11] when a judgment of *non pros* was entered in favor of Bryn Mawr Hospital on the first medical malpractice lawsuit. Therefore, the Joneses maintain that this new malpractice claim should be covered under the second insurance policy period effective from July 6, 1994 to July 6, 1996. I reject this argument.

An insurer's duty to defend and indemnify its insured is determined by the allegations set forth in the underlying complaint. Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 953 (Pa. Super. 1992), appeal denied, 637 A.2d 290 (Pa. 1993). This duty arises if the factual allegations of the underlying complaint on its face comprehend an injury which is actually or potentially within the scope of the policy coverage. Gedeon v. State Farm Mut. Auto. Ins. Co., 188 A.2d 320, 321 (Pa. 1963); American States Ins. Co. v. Maryland Cas. Co., 628 A.2d 880, 887 (Pa. Super. 1993). When determining whether Home Insurance has a duty

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11. I noted in the Memorandum of May 20, 1996 that judgment of non pros was entered in favor of Bryn Mawr Hospital on April 3, 1995. Mem. of May 20, 1996 at 2 n.1.

to defend and indemnify Powell Minehart, the terms of the insurance policy must be compared to the nature of the allegations of the underlying complaint of the Joneses for legal malpractice. See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988) (citations and quotations omitted). Upon review of the Joneses' legal malpractice complaint, there is no allegation that Powell Minehart committed malpractice when it settled the second medical malpractice lawsuit with Bryn Mawr Hospital in December 1992. The only actions of Powell Minehart that the Joneses complained of are its "failure to timely file the [Joneses'] complaint against David Rose, M.D. (and Bryn Mawr Hospital)" and "by failing to follow local rules of court by filing a supporting brief when required and due." Complaint, Exh. C ("Legal Malpractice Complaint), ¶ 20. There is nothing in the evidentiary record indicating that the Joneses amended their original complaint to include this alleged additional discovery of a new legal malpractice claim. Therefore, the attempt by the Joneses to create a "new" malpractice claim in their motion in opposition to summary judgment, which was not originally alleged, is unavailing.

B. Counterclaims

The viability of the Counterclaims of Powell Minehart at this stage in the proceedings is strictly a legal issue as there are no facts in dispute. I will accordingly apply a Rule 56(c) standard to the analysis.

1. Breach of Contract Counterclaim

In its Counterclaim for breach of contract, Powell Minehart states, in relevant part, the following:

> Home [Insurance] sold the 1993-94 Policy, Lawyers Professional Liability Policy No. LPL-909304-1, and the 1994-95 Policy, Lawyers Professional Liability Policy No. LPL-C133979-0 to Powell Minehart for good and adequate consideration.
>
> In compliance with the terms and conditions thereof, both as written in the Provisions to that Policy and based on the reasonable expectations Home [Insurance] induced Powell Minehart to foster, entertain, and rely upon, Powell Minehart timely notified Home [Insurance] that a claim would be lodged against it by former client, the Joneses.

> Nonetheless, Home [Insurance] denies it must provide coverage therefor, either in the way of a defense thereof or indemnity therefor, and seeks declarations of same.
>
> Home [Insurance]'s denials are a breach of its insurance contacts [sic] with Powell Minehart.
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> As a direct and proximate result of Home Insurance's denials, Powell Minehart will suffer financial harm by being forced to supply its own defense and/or indemnity.

Counterclaims ¶¶ 51-55. Although the Counterclaim contains the proper elements for a breach of contract action, I find that Powell Minehart can prove no set of facts that would entitle it to relief because its claim depends on the existence of viable insurance coverage. Because there is no coverage or potential for coverage for the Joneses' claims against Powell Minehart, neither a duty to defend nor indemnify arose. Because there is no coverage and because there is no duty to defend or indemnify, Home Insurance's denial of coverage could not have been a breach of contract. Therefore, I find that there is no genuine issue of material fact that would show that Home Insurance breached its insurance contract with Powell Minehart.

Powell Minehart argues that it can prove facts in support of its breach of contract allegations by showing that, due to oral representations of Home Insurance, it reasonably expected to be covered for its claims in connection with the Joneses' legal malpractice suit. Cases where the doctrine of reasonable expectations has been applied have involved coverage disputes arising from the application process and whether a policy existed at all or the attempt by insurers to enforce policy exclusion clauses. See Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994) (allowing discovery to determine whether new language in professional liability insurance policy's "prior litigation" exclusion provision was inconsistent with insured's reasonable expectation of type of coverage provided under agreement); Tonkovic v. State Farm Mut. Auto Ins. Co., 521 A.2d 920, 923-24 (Pa. 1987) (applying doctrine of reasonable expectations when insurer unilaterally limited the

scope of coverage provided by the policy by adding an exclusion about which it never informed the insured); Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1354 (Pa. 1978) (holding that applicant, who paid his first premium and received a "conditional receipt" for insurance, could have reasonably expected that insurer was obligating itself to provide coverage); Scott v. Southwestern Mut. Fire Ass'n, 647 A.2d 587, 591 (Pa. Super. 1994) (determining whether insured cancelled their home fire insurance policy coverage prior to date of fire); Dibble v. Security of Am. Life Ins. Co., 590 A.2d 352, 355 (Pa. Super. 1991) (holding that insured could have reasonably believed that mortgage life insurance policy coverage became effective upon first premium payment with application). The case at bar is factually distinguishable from those cases where the doctrine of reasonable expectations has applied in Pennsylvania. Home Insurance does not dispute that a professional liability policy was in existence during the relevant time period and that generally the policy provides coverage for a legal malpractice suit like that of the Joneses, nor does it assert that a classic exclusion applies. The language under scrutiny here is not within the "Exclusions" section of the policy; rather it appears within the "Coverage" section of the policy. Home Insurance does claim, however, that Powell Minehart had a basis to believe that it breached a professional duty to the Joneses when the insurance polices became effective in July 1993 and again in July 1994. Home asserts that thus the insuring agreement does not provide coverage for the claim presented by the Joneses. Powell Minehart cites no authority where the doctrine of reasonable expectations applies to a factual scenario like the one *sub judice*.

In sum, the issue is not whether general coverage exists for the Joneses' type of claim, but whether Powell Minehart can show facts in support of its claim that it objectively did not have a basis to believe that it had breached a duty to the Joneses at the time the insurance policy was issued and thus bring the particular claim of the Joneses within the insuring agreement. It is this subtle distinction that renders the doctrine of reasonable

expectations inapplicable here.[12] Two final observations should be noted. First, the insured, Powell Minehart is a sophisticated party, comprised of lawyers who, presumably, have had exposure to or have expertise in legal contractual issues. Powell Minehart does not assert any inequality in bargaining power when it applied for and was issued the professional liability insurance policy. This case is a far cry from a contract of adhesion where the parties have unequal bargaining power. Second, although it argues that oral representations had been made causing it to reasonably expect coverage with respect to the Joneses' legal malpractice suit, Powell Minehart submits no evidence, *i.e.*, affidavits or depositions, in support of that contention. Thus, Powell Minehart provides nothing more than bare assertions as to this issue, which is insufficient to withstand a motion for summary judgment. See Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d at 969. Because I

declared that Powell Minehart is not entitled to a defense and indemnification from Home Insurance on the Joneses legal malpractice lawsuit, I conclude that Home Insurance did not breach the contract with Powell Minehart. Therefore, I will grant the motion of Home Insurance on this issue as to Count I of the Counterclaims of Powell Minehart.

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12. Parenthetically, I note that there is legal precedent dictating that when the policy terms of an insurance policy are unambiguous, an insured may not assert its reasonable expectations were frustrated. See Bensalem, 38 F.3d at 1309 (citing Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983)). Powell Minehart does not assert in either its Counterclaim or its motion papers that the policy language at issue is ambiguous. This lends further support to the inapplicability of the reasonable expectations doctrine in this case.

One final insight into why the reasonable expectations doctrine does not apply to the factual scenario sub judice is that the trial court in Bensalem, supra, on remand, granted the insurance carrier's motion for summary judgment rejecting the application of the reasonable expectations doctrine and wrote an analysis, much of which is applicable here. See Bensalem Township v. Coregis Indem. Co., et al., Civ.A.No.91-5315, 1995 WL 290438, at *4-9 (E.D. Pa. May 10, 1995), aff'd, 77 F.3d 461 (3d Cir. 1996).

2. Bad Faith Counterclaim

To succeed on a claim for bad faith under Pennsylvania law, the insured must show the absence of a reasonable basis for denying benefits or a reckless disregard of the lack of a reasonable basis for refusing the claim. Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307-08 (3d Cir. 1995) (citing D'Ambrosio v. Pennsylvania Nat'l Mut. Ins. Co., 431 A.2d 966, 971 (Pa. 1981)). Bad faith requires proof of a dishonest purpose, state of mind affirmatively operating with ill will, and frivolous refusal to pay policy proceeds. Reading Tube Corp. v. Employers Ins. of Wausau, 944 F. Supp. 398, 403 (E.D. Pa. 1996). Mere negligence or bad judgment is not bad faith. Jung v. Nationwide Mut. Fire Ins. Co., 949 F. Supp. 353, 356 (E.D. Pa. 1997). Powell Minehart, in Count III of its Counterclaims, asserts Home Insurance refused to defend and indemnify it in bad faith.[13] Pursuant to Pennsylvania's bad faith insurance statute, 42 Pa. Cons. Stat. Ann.

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13. Specifically, Powell Minehart alleges:

> 68. Home [Insurance's] bad faith actions amount to those enumerated, supra, and upon which it induced Powell Minehart to believe it was purchasing professional liability insurance on the terms and with the protections fraudulently represented to it.
>
> 69. Though fully compliant with the letter and spirit of the aforesaid policies Powell Minehart purchased from Home [Insurance], Home [Insurance] has denied coverage thereunder in bad faith for the reasons stated.

Counterclaims ¶¶ 68, 69.

§ 8371 (West Supp. 1996),[14] Powell Minehart seeks punitive damages, costs, interest, and attorneys' fees.

If an insurer has no duty to defend or indemnify its insured, the insured cannot maintain a bad faith cause of action. See Younis Brothers & Co. v. CIGNA Worldwide Ins. Co., 899 F. Supp. 1385, 1397 (E.D. Pa. 1995) (citing Kiewit E. Co., Inc. v. L & R Constr. Co., Inc., 44 F.3d 1194, 1206 & n.39 (3d Cir. 1995)), aff'd, 91 F.3d 13 (3d Cir. 1996); see also Certain Underwriters at Lloyd's of London v. Lehigh Hoagie City, Inc., No. 96-3282, 1997 WL 50416, at *4 (E.D. Pa. Feb. 6, 1997) (holding that because there was no evidence that insurer breached any duty to its insured, there can be no evidence of any bad faith on the part of the insurer). Because I concluded earlier that, as a matter of law, at the time the policies were issued, Powell Minehart objectively had a basis to believe it breached a duty to the Joneses, and therefore Home Insurance had no duty to defend or indemnify Powell Minehart, I now find that Home Insurance had a reasonable basis for contesting whether it had to defend and indemnify Powell Minehart. Therefore, I find that Powell Minehart has not and cannot, as a matter of law, allege sufficient facts that could prove that Home Insurance's denial to defend and indemnify Powell Minehart was frivolous, dishonest, or motivated by ill will. I will grant

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14. Section 8371 states:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371.

the motion of Home Insurance on this issue as to Count III of the Counterclaims of Powell Minehart.

III. CONCLUSION

For the foregoing reasons, I will enter judgment in favor of Home Insurance and declare that Powell Minehart is not entitled to a defense and indemnification in its underlying lawsuit with the Joneses and I will, as well, grant judgment in favor of Home Insurance as to the Counterclaims of Powell Minehart.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE HOME INSURANCE COMPANY,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
KENNETH J. POWELL, JR., ESQUIRE, et al.,	:	
Defendants.	:	**NO. 95-6305**

O R D E R

AND NOW, on this 13th day of June, 1997, upon consideration of the motion by plaintiff The Home Insurance Company for summary judgment (Document No. 19), and responses of defendants Kenneth J. Powell, Jr., Esquire, James P. Lyons, Esquire, Jeffrey P. Minehart, Esquire, Powell & Minehart, Powell, Hanes & Minehart, and Powell, Hanes & Minehart as successors in interest to Powell, O'Shea, Hanes & Minehart ("Powell Minehart"), and Patricia Boylan-Jones and Richard Jones (collectively the "Joneses"), and the supplemental briefs of the parties thereto, having found that the pleadings, depositions, affidavits, discovery and affidavits of record fail to show that there is a genuine issue of material fact, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion for summary judgment is **GRANTED**.

IT IS HEREBY DECLARED that The Home Insurance Company has no obligation to defend or to indemnify the insured, Powell Minehart, or any of its attorneys, partners, or employees for the claims raised in the Joneses' legal malpractice suit in the Court of Common Pleas of Philadelphia County, Docket No. 1914, and that if the Joneses obtain a judgment against Powell Minehart, or any of its attorneys, partners, or employees requiring the payment of damages, expenses, costs or fees, The Home Insurance Company has no obligation to pay or indemnify Powell Minehart or any of its attorneys, partners, or employees for any

such amounts pursuant to the applicable professional liability insurance policies # LPL-F909304 and # LPL-C133979-0.

IT IS FURTHER ORDERED that summary judgment is hereby entered in favor of The Home Insurance Company as to the Counterclaims of Powell Minehart.

This is a final Order.

LOWELL A. REED, JR., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE HOME INSURANCE COMPANY,	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
KENNETH J. POWELL, JR., ESQUIRE, et al.,	:	
Defendants.	:	**NO. 95-6305**

O R D E R

AND NOW, on this 12th day of June, 1997, upon a determination that this Court did not adequately express its reasoning solely in section B.1, entitled "Breach of Contract Counterclaim," at slip opinion pages 19-21 inclusive, in the Memorandum dated June 9, 1997 (Document No. 31), it is hereby accordingly **ORDERED** that the Memorandum and Order dated June 9, 1997 are **VACATED and SET ASIDE**.

IT IS FURTHER ORDERED that the Memorandum and Order dated June 13, 1997 are intended to replace in their entirety the vacated Memorandum and Order dated June 9, 1997.

LOWELL A. REED, Jr., J.